Bhola Singh Vs. State of Haryana

Present:- Mr. Ajit Attri, Advocate, for
Mr. Ashit Malik, Advocate, for
the appellant.

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Mr. Ajay Ghanghas, DAG, Haryana.

Virender Singh, J.

Bhola Singh appellant stands convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 vide impugned judgment dated 20-2-1998 passed by the learned Additional Sessions Judge, Karnal and has been sentenced to undergo RI for ten years and to pay a fine of Rs. One lac, in default to suffer further RI for 2-1/2 years. Aggrieved by the judgment of conviction and sentence, he has preferred the instant appeal.

It has been brought to my notice that the substantive sentence of the appellant was suspended by this Court and he is on bail.

The charge against the appellant is that on 23.4.1994 in the area of Asandh at Jind Road bandh he was found in possession of 16 Kgs of poppy husk without any permit or licence.

Briefly, the case of the prosecution is that ASI Ram Parkash (PW3) alongwith the other police officials had intercepted the appellant when he was seen coming on foot from the side of village Bandarala. Since the ASI

suspected the appellant carrying some contraband in the plastic bag in his hand, an offer was made to him vide memo. Ex.PF as to whether he wanted to get his search conducted from him (ASI Ram Parkash) or before some gazetted officer or a Magistrate. The said memo was signed by the appellant and attested by Constables Rajbir and Vinod Kumar. The appellant opted to get his search conducted before some gazetted officer . After that Constable Krishan Chand was asked to bring the Deputy Superintendent of Police, Asandh to the spot. Consequently Shri Kartar Singh DSP (PW2) reached the spot. IN his presence the search of the plastic bag was conducted. It was found to contain poppy husk. On weighment, it was found to be 16 Kgs. 200 grams out of it was separated as sample. The sample and the residue were sealed with the seal (of ASI Ram Parkash) bearing impression `RP'. The seal after use was handed over to Constable Rajbir. The case property was taken into possession vide recovery memo. Ex.PE. Ruqqa (Ex.PA) was sent to the police station on the basis of which formal FIR (Ex.PA/1) was recorded. The other formalities of invedstigation were also completed at the spot. Thereafter the appellant along with the case property was produced before SI/SHO Pardhan Singh, who after verifying the facts affixed his own seal on the case property and the sample parcel. The case property was then deposited with Moharrir Head Constable Dharmvir for keeping it in safe custody. After receipt of the report of the Forensic Science Laboratory and completion of investigation, the appellant was sent up to face trial. He was

consequently charged under Section 15 of the Act. He has now suffered conviction.

The prosecution has relied upon the statements of PW1- SI Pardhan Singh, PW2 DSP Kartar Singh and PW3 ASI Ram Parkash, the Investigating Officer. In order to prove the link evidence, affidavits of MHC Dharamvir and Constable Jai Bhagwan have been tendered into evidence. The other witnesses of recovery were given up as unnecessary.

When examined under Section 313 of the Code of Criminal Procedure, the appellant denied all the allegations and pleaded innocence. However, he did not adduce any evidence in defence.

I have heard Mr. Ajit Attri, learned counsel for the appellant and Mr. Ajay Ghanghas, Deputy Advocate General, Haryana. With their assistance, I have carefuly perused the entire record.

The main attack of learned counsel for the appellant on the prosecution case is that the mandatory provisions of Section 50 of the Act have not been complied with in letter and spirits. Drawing my attention to the memo. Ex.PF, Mr. Attri submits that before conducting the search, the offer given to the appelant is as to whether he wanted to get the search conducted by ASI Ram Parkash or some gazetted officer . According to the learned counsel, this offer is not a true offer as per the provisions of Section 50 of the Act, as the Investigating Officer could not ask the appellant for getting the search conducted by him. Mr.

Attri submits that the offer could be only to the effect as to whether the appellant wanted to get the search conducted in the presence of a gazetted officer or a Magistrate and as such the appellant deserves acquittal on this basic infirmity alone. In support of his contentions, the learned counsel relies upon the Full Bench decision of this Court rendered in **Mohan Singh Vs. State of Punjab, 2004 RCR (Crl.) 260.**

I do not agree with the submission made by learned counsel for the appellant. In a latest judgment rendered by a Larger Bench in **State of Himachal Pradesh Vs. Pawan Kumar, JT 2005(4) Supreme Court 378**, their Lordships have held that in case a contraband is being carried by an accused in his hand, it does not amount to search of a person and as such Section 50 of the Act is not attracted. In view of the latest law laid by Hon'ble the Supreme Court, the judgment in Mohan Singh's case (supra) would not come to the rescue of the appellant.

However, the appellant has otherwise a good case on other infirmities, pointed out by Mr. Attri. He attacks the prosecution case submitting that the recovery is allegedly effected at about 6-20PM on 23-4-1994 at a busy place but still ASI Ram Parkash did not make any attempt to join an independent witness. Drawing my attention to the cross-examination of the Investigating Officer, Mr. Attri points out that this witness has categorically admitted that no public witness was joined and the entire investigation took three hours. The

learned counsel contends that this infirmity goes to the root of the case and speaks volumes of the false implication of the appellant. Strengthening his arguments, Mr. Attri contends that the prosecution could be given some latitude for non-joining of the independent witness but once the case of the prosecution resting upon testimony of police officials alone suffers from many basic weaknesses, in that eventuality non-joining of independent witness would assume importance. From this angle, the learned counsel has drawn my attention to the deposition of DSP: Kartar Singh (PW2) and ASI Ram Parkash (PW3), pointing out certain intrinsic infirmities in the case of the prosecution.

The learned counsel then attacks the case of the prosecution on the point of non-compliance of Section 55 of the Act, contending that there is no evidence on the file to show that the case property was kept under safe custody of SI Pardhan Singh (PW1) and it was not even produced before the Illaqa Magistrate on 24.4.1994 along with the appellant. He has also drawn my attention to the affidavit Ex.PB of MHC Dharamvir, wherein it is mentioned that the case property was deposited with him on 23.4.1994 and then it was handed over to Constable Jai Bhagwan, who has taken it to the Forensic Science Laboratory.

On the basis of the aforesaid submissions, the learned counsel prays for acquittal of the appellant.

On the other hand, the learned State counsel repudiates the submissions made on behalf of counsel for the appellant, contending that there is

no reason to disbelieve the official witnesses, who were acting in the discharge of their official duty and that the infirmities, if any are there, the same can be ignored being immaterial.

The submissions made by Mr. Attari are quite convincing. Admittedly, no independent witness has been joined in this case though the place of alleged recovery was a busy passage. The case of the prosecution thus hinges upon the sole testimony of police officials. Though there is no hard and fast rule that the case of the prosecution has to be discarded simple for the reason that it rests upon the testimony of official witnesses, yet once the independent witness is not joined despite availability of the persons at the spot, in that eventuality, the court is supposed to scrutinize the evidence of the prosecution with more care and caution. Applying the same test , I have minutely re-scanned the statements of DSP Kartar Singh and ASI Ram Parkash, the Investigating Officer. There is a very material discrepancy with regard to reaching of DSP Kartar Singh at the spot. In his cross-examination, DSP Kartar Singh states that he reached the spot at 5-45 PM and thereafter on his direction whole of the investigation was conducted. On the other hand, ASI Ram Parkash states that it took about three hours at the spot in completing the investigation. Ruqqa Ex.PA indicates that it was sent at 6-20PM. It is not possible that the whole investigation was completed within 35 minutes. It has come in the statement of DSP Kartar Singh that after he reached the spot, he directed ASI Ram Parkash to conduct the search and therafter the ASI

sent Constable Rajbir to bring weights and scales and on his arrival, the case property was weighed. This indicates that the recovery is not effected in the manner now projected by the prosecution. This basic infirmity knocks at the bottom of the case.

I have doubted the case of the prosecution yet from another angle. A specific question was put to the Investigating Officer about affixing of seal on the sample parcel and the residue. He stated that he had affixed one seal of `RP' on the residue which also bears one seal of the SHO. There was one seal with impression `RP', whereas the other seal was found broken. Admittedly the case property has not been produced before the concerned court of Illaqa Magistrate on the next day of recovery i.e. 24.4.1994, as is clear from the evidence produced on the judicial file. SHO Pardhan Singh does not say even a word that he kept the case property in his safe custody on 23.4.1994 and then directed any police official to produce the same alongwith the accused before the Illaqa Magistrate. In view of the said factual situation, non compliance of the provision of Section 55 of the Act is writ large. No doubt the provisions of Sections 55 of the Act are directory in nature, but if the accused is able to prove that on account of non-compliance thereof a prejudice has been caused to him, in that situation the non-compliance of the said provisions assumes importance. In my considered view on account of the infirmities detailed above, non-compliance of the provisions of Section 55 has certainly caused prejudice to the appellant.

As a sequel to the aforesaid discussion, the net outcome now surfaces is that the prosecution has not been able to prove its case beyond the shadow of reasonable doubt against the appellant with regard to his conscious possession qua the contraband (16 Kgs of poppy husk). Resultantly the appeal succeeds and is hereby allowed. The impugned judgment of conviction is set-aside and the appellant is acquitted of the charge. His bail/surety bonds stand discharged forthwith.

[VIRENDER SINGH]
JUDGE

May 11, 2005.
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